No. 89-1243

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOSEPH M. GALLOWAY,
JOSEPH M. GALLOWAY, P.C.
CLAIR J. GALLOWAY,

Petitioners,

vs.

ALAN ZUCKERT,
JANICE H. ZUCKERT,

Respondents.

ON A PETITION FOR A WRIT OF
CERTIORARI TO THE IOWA COURT
OF APPEALS

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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CITATION TO OPINION BELOW

Galloway v. Zuckert, 447 N.W.2d 553 (Iowa Ct. App. 1989)

STATEMENT OF JURISDICTION

Petitioners state as the basis of this Court's jurisdiction 28 U.S.C. § 1257(3). It is assumed Petitioners are relying on 28 U.S.C. § 1257 as there is no longer a 28 U.S.C. § 1257(3).

This Court does not have jurisdiction as the Petitioners freely admit that they failed to raise any constitutional issues at any stage of the proceedings below. Furthermore, this case does not involve an important question of federal law but rather involves state libel law.

STATEMENT OF THE CASE

This case arose out of a landlord/tenant dispute between Joe and Clair Galloway (Petitioners herein) and Alan Zuckert (Respondent herein), their landlord. Eight causes of action were presented to the jury by the Petitioners, including a claim of libel which is the only issue involved in the Petition for Writ of Certiorari.

The claim of libel arose out of a May 21, 1986 letter written by Alan Zuckert to Joe Galloway. This letter was in response to a demand for damages made by Joe Galloway over one year after he and his father, Clair Galloway, had left the offices they had rented from Mr. Zuckert. A copy of the letter written by Mr. Zuckert was sent to Mr. Zuckert's

attorney, Bud Hockenberg, (who only coincidentally was serving as Chairperson of the Des Moines Chamber of Commerce) and to an individual named Elaine Amber who operated a business called Secretarial Services of Iowa. Ms. Amber had requested a copy of Mr. Zuckert's letter since her business had been mentioned in Joe Galloway's earlier demand letter. Ms. Amber testified at trial that Mr. Zuckert's letter did not cause her to think any less of Joe Galloway, did not cause her not to like him and did not cause her to feel that she would not want to do business with him. (Tr. p. 720).

On January 19, 1988, the jury unanimously decided that Joe Galloway had failed to prove libel. The Iowa Court of

Appeals affirmed the jury's verdict by decision dated August 23, 1989. The Petitioners requested that the Iowa Court of Appeals rehear the case, which was denied. The Petitioners also asked that the Iowa Supreme Court grant further review of the Court of Appeals decision, which request was denied by the Iowa Supreme Court on November 3, 1989.

SUMMARY OF ARGUMENT

The Supreme Court should not grant certiorari in this case as it does not involve an important question of federal law. Rather, this case arises out of a decision of the Iowa Court of Appeals concerning Iowa libel law as it pertains to private plaintiffs suing private defendants.

The Petitioners did not raise any constitutional challenges at any stage of the proceedings below, and the Iowa Court of Appeals did not, in any way, base its decision on constitutional principles. Since no federal rights were adjudged by the Iowa Court of Appeals, this Court should decline to review the state court decision.

REASONS FOR DENYING WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION AS PETITIONERS ADMIT THEY FAILED TO RAISE THEIR EQUAL PROTECTION ARGUMENT AT ANY STAGE OF THE PROCEEDINGS BELOW.

The Supreme Court is prohibited both by statute and rule from deciding issues that have not been presented first to state courts. 28 U.S.C. § 1257; SUP. CT. R. 21.1(h). The Petitioners admit that

they have not raised constitutional issues at any stage of the proceedings below. It has been stated frequently by this Court that the jurisdiction of the Supreme Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. Webb v. Webb, 451 U.S. 493, 496-97 (1981). The primary reason behind this requirement is that comity requires that state courts be afforded the opportunity to perform their separate functions. From a practical standpoint, the requirement affords the litigants an opportunity to fully develop the record necessary for adjudicating the issue and it permits state courts to

exercise their authority first, which may obviate any need for the Supreme Court to become involved. Id. at 499-501.

The Petitioners attempt to avoid the requirement of first raising constitutional issues below by claiming that their failure to do so was the result of an "extraordinary circumstance" and is thus exempt under Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896 n. 7 (1984). The Petitioners' reliance on Sure-Tan is misplaced, however. In that case, the statute under which suit had been brought (the National Labor Relations Act), specifically allowed arguments to be raised for the first time in the appeal from a decision of the NLRB upon a showing of "extraordinary circumstances." 29 U.S.C. § 160(e).

In the present case, however, the exact opposite is true as Iowa law requires that constitutional issues be first raised at the trial court level. The Iowa Supreme Court has made clear that it will not review issues raised for the first time on appeal, even if of constitutional magnitude. Estabrook v. Iowa Civil Rights Comm'n., 283 N.W.2d 306, 311 (Iowa 1979); Shill v. Careage Co., 353 N.W.2d 416, 420-421 (Iowa 1984).

It should also be noted that Petitioners' claim that they could not have raised their constitutional issues at an earlier time is factually without merit. Petitioners claim that until the Iowa Supreme Court decided Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989), they could not have

known that a negligence standard would be applied in libel cases involving private plaintiffs and media defendants. Thus, Petitioners argue that they had no opportunity to raise an equal protection argument with respect to the fact that different standards apply to private plaintiffs suing media defendants than apply to private plaintiffs suing private defendants.

In fact, however, the Iowa Supreme Court had specifically addressed this issue years earlier in Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108 (Iowa 1984). In Vinson, the Iowa Court considered whether the existing standard of proof for private libels should be modified to adopt the negligence standard set forth in Gertz v. Robert Welch, Inc.,

418 U.S. 323 (1974) for actions by private individuals against media defendants. The Iowa Supreme Court held:

> In contrast to Gertz, the present case involves a non-media defendant. Thus no constitutional basis for applying the Gertz constraints appears. Because the plaintiff is not a public official or public figure, our holding in Anderson v. Low Rent Housing Commission, 304 N.W.2d 239 (Iowa 1981), is also distinguishable. In this situation where only a private plaintiff and non-media defendant are involved, the common law standard does not threaten the free and robust debate of public issues or a meaningful dialogue about self-government, or freedom of the press. We refuse to extend the Gertz holding to actions between a private individual and a non-media defendant. The same conclusion has been reached in the majority of jurisdictions in which the issue has arisen. (Citations omitted).

360 N.W.2d at 118. Thus, at the time this case was tried, the Iowa Supreme Court had already decided the issue Petitioners now seek to raise for the first time in their Petition for Writ of Certiorari. The Petitioners failed to raise any constitutional issues before either the trial court or the Iowa Court of Appeals and cannot now raise them for the first time.

II. EVEN ASSUMING, ARGUENDO, PETITIONERS HAD RAISED AN EQUAL PROTECTION ARGUMENT BELOW, THE ARGUMENT HAS NO MERIT.

It is the Petitioners' position that the equal protection clause of the United States Constitution is violated because media defendants being sued for libel in Iowa are held to a different standard than are private individuals who are sued

for libel. Of course, because this issue was not raised below, there has been no record developed by the parties on this issue and no decision by the Iowa Court of Appeals on the merits of the Petitioners' argument.

The instant litigation involves an allegation of a purely private libel. The Petitioners argue for the first time tnat the burden of proof imposed in private libel cases is a denial of equal protection in light of the fact that private plaintiffs suing media defendants must prove negligence rather than malice as must be proved against private defendants. See, Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989) (negligence standard applied when a private plaintiff brings an action

for defamation against a media defendant); Vojak v. Jensen, 161 N.W.2d 100, 105 (Iowa 1968) (statements which are not libel per se require proof of malice, falsity and damage). As noted earlier, long before trial of this case the Iowa Supreme Court had expressly found there to be a rational basis to distinguish between the standards of proof applicable to media defendants and those applicable to non-media defendants. Vinson v. Linn-Mar Community School District, 360 N.W.2d 108, 118 (Iowa 1984).

This Court has also recognized that there are substantially different interests involved in purely private libels than are involved in libels which involve public affairs and First

Amendment concerns. Garrison v. Louisiana, 379 U.S. 64, 72 n. 8 (1964). As noted by Justice Goldberg in New York Times Co. v. Sullivan, 376 U.S. 254, 301-302 (1964):

> Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-serving society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

Indeed, even when media defendants alone are involved, the standards of libel are different depending upon who is libeled. Public officials or figures must prove "actual malice" on the part of the media as that term is defined in New York Times Co. v. Sullivan, supra at

279-280. The standard of liability as to private individuals, however, is left up to the states to define and, so long as the media is not subject to liability without fault, a standard less rigorous than New York Times may be imposed. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-348 (1974).

A rational basis exists to establish a different burden of proof in cases of individuals defamed by media defendants, as opposed to private defendants, as the potential damage of a false statement by the media is much greater than a false publication which finds its way to a very small number of persons. The Iowa Supreme Court has already decided this issue and the Petitioners' argument is

without merit, even if it had been properly raised by the Petitioners.

III. THE DEFINITION OF MALICE IN A LIBEL ACTION IS A MATTER OF STATE LAW AND THIS COURT DOES NOT INVOLVE ITSELF WITH NON-FEDERAL ISSUES.

The Petitioners raise as one of their "constitutional" issues that the Iowa Court of Appeals erred in upholding a jury instruction which defined actual malice as "a statement made concerning another because of ill-will or hatred, or made recklessly with an intent to injure." (Appendix A). Petitioners fail to identify, however, how the definition of malice in any way involves a constitutional issue. The only constitutional provision cited by the Petitioners in their Petition for Writ of

Certiorari is the equal protection clause of the 14th Amendment. (Petition, p. 2). In their argument, however, the Petitioners fail to address even remotely how they were denied equal protection as a result of the definition of actual malice presented to the jury. Arguments which fail to state with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason to deny a Petition for Writ of Certiorari. SUP. CT. R. 21.5.

At no time in the proceedings below did the Petitioners assert a constitutional challenge to the trial court's definition of actual malice. (Appendix B and C). The Iowa Court of

Appeals properly decided this issue as a matter of state law.

The law of libel is not a question of federal law, but is rather a state common law cause of action. This Court has expressed the clear position that it will not review state court judgments decided only on non-federal grounds. Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

The issue of whether the trial court properly instructed the jury on the definition of actual malice is not an issue of federal law. Furthermore, the Petitioners have at no time previous hereto raised a constitutional challenge to the jury instruction.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Diane M. Stahle, a member of the Bar of this Court, hereby certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari were served on Joseph M. Galloway, 550 39th Street, Suite 304, Des Moines, Iowa 50312 and Clair J. Galloway, 550 39th Street, Suite 304, Des Moines, Iowa 50312, by enclosing the same in an envelope bearing the appropriate addresses, with prepaid postage affixed thereto, and by depositing the same in a United States Post Office depository in Des Moines, Iowa on the 21st day of February, 1990.

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APPENDIX A

JURY INSTRUCTION NO. 26 ON DEFINITION OF LIBEL AND ACTUAL MALICE

INSTRUCTION NO. 26

For the purposes of this claim of libel, the following definitions are applicable:

1. "Libel" is a malicious defamation of a person published in writing which tends to injure the reputation of another or expose him to public hatred, contempt or ridicule.

2. "Actual malice" refers to a condition of the mind which exists if a person makes statements concerning another because of personal spite, hatred or ill will against said person to, or against whom said action is directed. It may also result from a reckless or wanton disregard of the rights of others.

"Actual malice" exists only where there is evidence tending to show that the act was done willfully, wantonly or recklessly with an intent to injure.

APPENDIX B

GALLOWAYS' OBJECTION TO JURY INSTRUCTION NO. 26 ENTERED JANUARY 14, 1988

And I would object to Instruction No. 26, which defines actual malice, and I am referring to the last five words of the instruction. I do not believe that actual malice requires an intent to injure but can also be satisfied by reckless conduct. So my suggestion would be to simply put a period after recklessly and omit the last five words.

THE COURT: Any other comments?

MR. JOSEPH GALLOWAY: No other comments, Your Honor.

(Trial Transcript p. 776).

APPENDIX C

EXCERPT FROM GALLOWAYS' APPEAL BRIEF RE DEFINITION OF ACTUAL MALICE FILED AUGUST 2, 1988.

III. THE DEFINITION OF ACTUAL MALICE GIVEN TO THE JURY WAS INCORRECT.

Although we contend that actual malice is not necessary to establish a claim for libel, in the absence of a qualified privilege, even if this Court decides that it is required, the definition of actual malice given to the jury was still incorrect.

Paragraph 2 of the Trial Court's Jury Instruction No. 26 stated that:

> 2. "Actual malice" refers to a condition of the mind which exists if a person makes statements concerning another because of personal spite, hatred or ill will against said person to, or against whom said action is directed. It may also result from a reckless or

> wanton disregard of the rights of others. "Actual malice" exists only where there is evidence tending to show that the act was done willfully, wantonly or recklessly with an intent to injure (App. p.).

Plaintiff objected to this Instruction because of the last five words "with an intent to injure", and asked that these five words be deleted from the Instruction (Tr. p. 776).

By adding the requirement that there be an intent to injure, the Instruction seems to cancel out its previous references to recklessness. "Recklessness" and "intent to injure" seem to be inconsistent concepts. Recklessness implies a total lack of care about the consequences. See Clark v. Marietta, 138 N.W.2d 107, 111 (Iowa

1965), where this court stated regarding reckless driving, "It means, proceeding with no care coupled with disregard for consequences..."

If one has an intent to injure, on the other hand, obviously one does care about the consequences -- those consequences are desired to be harmful to someone.

At the very least, the jury would be confused by adding "intent to injure" on top of "recklessly."

a. Common law definition of actual malice.

The first two sentences of the Instruction seems to be correctly derived from Vojak v. Jensen, 161 N.W.2d 100, 107 (Iowa 1968). The Vojak decision states that actual malice can result from "a

reckless or wanton disregard of the rights of others." Id. There is no reference therein to an "intent to injure" being required, as contained in the third sentence of the Instruction. See also Cherry v. Des Moines Leader, 86 N.W. 323 (Iowa 1901), where actual malice in a libel case is defined as "personal spite or ill will, or culpable recklessness or negligence." Again, there is no requirement of an "intent of injure." Thus, the Instruction appears to be erroneous under the common law definition of actual malice.

b. "New York Times" definition of actual malice.

In New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964), "actual malice" is defined as making a statement "with

knowledge that it was false or with reckless disregard of whether it was false or not." Again, no requirement of an intent to injure is indicated.

It is true that later cases mention an "intent to inflict harm through falsehood," quoted in McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152, 156 (Iowa 1976). However, this must be taken in the context of the discussion of whether a mere intent to injure is sufficient. Under the New York Times standard, the focus is on the defendant's attitude toward investigating the accuracy of the statement rather than on defendant's personal feelings toward the plaintiff. Thus, the cases hold that a mere intent to injure plaintiff is not sufficient to generate liability unless

the statement itself is either made with sufficient knowledge of falsehood or recklessness in determining whether it is accurate. Thus, the statement is made in cases that an "intent to injure" is not enough, but rather there must be an "intent to injure through falsehood." This does not mean that the alternative standard of recklessness in checking accuracy has been abandoned. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-57 (1967), especially n. 20, where the U.S. Supreme Court affirmed a media libel award based on recklessness in investigating accuracy rather than on any serious contention that defendant had animosity toward plaintiff.

Thus, the Trial Court in our case erred by making an "intent to injure" a

necessary element of actual malice, which prejudiced Plaintiff since recklessness without an intent to injure is sufficient.